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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935

No. 29

RICHEY V. GRAHAM,
Petitioner,

vs.

THE WHITE-PHILLIPS COMPANY, INC.,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT.

WILLIAM L. PATTON,
Springfield, Illinois,
HAROLD A. SMITH, and
WINSTON, STRAWN & SHAW,
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Petition for Certiorari Filed April 23, 1935.
Certiorari Granted May 27, 1935.

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ERRATA IN BRIEF OF RESPONDENT.

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(1) On page 17 in fourth line of third paragraph "appellee" should read "petitioner".

(2) On Page 24 in second and third lines, "one cause" should read "due course".

(3) On Page 59 in third line of quotation, "found" should read "bound".

WILLIAM L. PATTON,
Counsel for Respondent.

HAROLD A. SMITH and
WINSTON, STRAWN & SHAW,
Of Counsel.

SUBJECT INDEX.

	PAGE
STATEMENT OF FACTS	1
POSITION OF RESPONDENT	2
SUMMARY OF ARGUMENT AND BRIEF	3
DISCUSSION OF PROPOSITIONS	15
Preliminary analysis	15
The Negotiable Instruments Act does not deal with evidentiary matters	24
Circularization as to stolen bonds and ignoring thereof does not establish bad faith	26
The denial of certiorari by the Illinois Supreme Court in the case of Northwestern Nat. Bank v. Madison & Kedzie State Bank was not a construction of the statute by the highest court of Illinois	40
Burden of proof	53
CASES RELIED UPON BY PETITIONER	57
CONCLUSION	60

AUTHORITIES CITED.

Adrian v. Whitney, C. & N. Bank, 180 Mich. 171	4
Anglo-Am. etc. v. Lombard, 132 Fed. 721	11
Arnd v. Aylesworth, 145 Ia. 185	4
Bank of Commerce etc. v. Randell, 107 Neb. 332	3
Beltzhoover v. Blackstock, 3 Watts (Pa.) 20	5, 7
Boyd v. McCann, 10 Md. 118	5
Buckner v. C. M. & N. W. Ry., 60 Wis. 264	31
Burns Mtg. Co. v. Fried, 292 U. S. 487	10, 40, 41

PAGE

AUTHORITIES CITED (CONTINUED).

Campbell v. Fourth Nat. Bank, 137 Ky. 555 3
Chi. Auto Sales Co. v. Peters, 221 App. 363 ..... 4, 23, 25
Childs v. Harris T. & Sav. Bank, 27 Fed. 2nd 633 57
Citizens Nat. Bank v. Waugh Adv. Sheets, 78 Fed. 2nd 325 ..... 10, 16
Citizens' State Bank v. Johnson Co., 182 Ky. 531 3
City Bank v. Bank of Rep., 300 Ill. 103 3
Clark v. Ricker, 14 N. H. 44 5
Clayton v. Colo. & So. R., 51 Fed. 2nd 417 13
Commercial Nat. Bank v. Canal-L. B. & Tr. Co., 239 U. S. 520 3
Cont. Sec. Co. v. Interbor. R. T. Co., 165 Fed. 945 ..... 11, 53
Corpus Christi G. Co. v. Corpus Christi, 36 Fed. 2nd 972 11
Corpus Juris, Vol. 25, p. 846 10
C. R. I. & P. v. Hamler, 215 Ill. 525 22
Crittenden v. Widrewitz, 272 Fed. 871 8
Crouch v. First Nat. Bank, 156 Ill. 342 23

Des Moines Sav. Bank v. Arthur, 163 Ia. 205 8
Drouineau v. Bank, 244 Ill. App. 251 4

Employers Liab. Assur. Corp. v. Greenfield, 175 Atl. 403 9
Eng. Am. L. & T. Co. v. Hiers, 38 S. E. 103 5

Fed. Lend. Co. v. Swyers, 161 Fed. 687 11
Fillebrown v. Hayward, 190 Mass. 472 4
First Nat. Bank v. Dutton, 199 Ia. 468 8
F. & W. Grand 5-10-25 Cent Stores, In re, 69 Fed. 2nd 807 12

PAGE

AUTHORITIES CITED (CONTINUED).

Gary, In re, 281 Fed. 218 11
Gerseta Corp. v. W. C. Silk Co., 3 Fed. 2nd 236 ..... 3, 5, 23
Gill v. Cubitt, 3 Barn. & Cress. 466 27
Goldberg & Lewis, Ex parte, 191 Ala. 356 3
Goodman v. Harvey, 4 Ad. & El. 870 27
Goodman v. Simonds, 20 How. 343 ..... 4, 19, 20, 27
Gulf Paving Co. v. Atlanta, 149 Ga. 114 13

Hall v. Main, 34 Fed. 2nd 528 11
Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251 ..... 12, 50
Hayden v. Bowery Nat. Bank, 6 Lans. 490 5
Heney v. Sutro, 28 Calif. App. 702 ..... 5, 7, 23, 33
Halliday v. Elberton L. & S. Bank, 128 S. E. 131 5
Hotchkiss v. Nat. Banks, 21 Wall. 354 ..... 8, 22
Hudson v. Maryland Casualty Co., 22 Fed. 2nd 791 ..... 12, 50

Independent School Dist. v. Rew, 111 Fed. 1 ..... 10, 16
Illinois Rev. Stat. Cahill (1933) 1919 24

Jerke v. Delmont St. Bank, 223 N. W. 585, 54 So. Dak. 446 ..... 9, 57
Jockmus v. Claussen, et al., 47 Fed. 2nd 766 10
Johnson Co. Sav. Bank v. Walker, 79 Conn. 348 8

Knolt v. Cartwright, 202 Ill. App. 502 5

Link v. Jackson, 158 Mo. App. 63 ..... 3, 5
London J. S. Bank v. Simmons (1892) App. Cas. 219 ..... 5, 6, 29
Long Island L. & T. Co. v. Col. & I. C. R. Co., 65 Fed. 455 26
Lord v. Wilkinson, 56 Barb. 593 ..... 5, 39

PAGE.

AUTHORITIES CITED (CONTINUED).

Marine Nat. Exch. Bank v. Kalt-Zimmers Mfg. Co., 79 L. ed. 208 ..... 10, 40, 41
Mass. Nat. Bank v. Snow, 187 Mass. 159 4
Merch. Nat. Bank v. Det. Tr. Co., 258 Mich. 526, ... 4, 7, 9, 14, 25, 57
Michigan v. Mich. Trust Co., 286 U. S. 334 12
Minn. St. P. & S. S. M. Ry. Co. v. Rack, 279 U. S. 410 ..... 12, 49
Mickey Bros. v. Lonsdale Mfg. Co., 149 Tenn. 1 5
Morris v. Muir, 181 N. Y. Supp. 913 4
Murray v. Lardner, 2 Wall. 110 19

Nat. Bank v. Uptown State Bank, 273 Ill. App. 401, ... 8, 14, 34, 36
N. W. Nat. Bank v. Mad. & Ked. State Bank, 242 Ill. App. 22 ..... 7, 17, 25, 38, 40, 43, 57

Paine v. Sheridan Tr. & Sav. Bank, 342 Ill. 342, ... 13, 42, 43, 44, 56
People v. Grant, 283 Ill. 391 ..... 12, 47
Perry Sav. Bank v. Fitzgerald, 167 Ia. 446 8
Pana v. Bowler, 107 U. S. 529 13
Peterson v. Emery, 154 Ill. App. 294 5
Peterson v. Metro. L. Ins. Co., 19 Fed. 2nd 74 ..... 3, 10
Piedmont etc., R. Co. v. Shaw, 223 Fed. 973 3
Pollard v. Toben, 211 Wisc. 405 5
Presidio County v. Noel-Young Bond Co., 212 U. S. 58 10
Pridgen v. Baugh & Sons Co., 30 Fed. 2nd 353 8

Raphael v. Bank of Eng., 139 Engl. Rep. 1030 ..... 5, 6, 27, 34
Robertson v. U. S. Live Stock Co., 164 Ia. 230 8
Ruling Case Law, Vol. 27, page 52, Sec. 58 10
Ruling Case Law, Vol. 25, page 957 13

PAGE

AUTHORITIES CITED (CONTINUED).

Salem Tr. Co. v. Man. Fin. Corp. (1924), 264 U. S. 182 10
Salmond on Jurisprudence (7th Ed.) 409 22
Sears v. Greater N. Y. D. Co., 51 Fed. 2nd 46 10
Seybel v. Nat. Cur. Bank, 54 N. Y. 288 4, 7, 38
State Bank v. Bilstad, 136 N. W. 204 4
Stewart Dry Goods Co. v. Lewis, 7 Fed. Supp. 438 13
Swift v. Tyson, 16 Pet. 1 9, 19

Taylor v. Taylor, 162 Tenn. 482; 40 S. W. 2nd 393 32
Terre Haute & L. R. Co. v. Erdel, 158 Ind. 344 13
Trapp v. Met. L. Ins. Co., 70 Fed. 2nd 976 11

Unaka Nat. Bank v. Butler, 113 Tenn. 574 3, 5
Union Pac. Co. v. Mason City Co., 199 U. S. 160 32
Union Tr. Co. v. McGinty, 212 Mass. 205 4
United States v. Carver, 260 U. S. 482 12, 50

Venables v. Baring Bros. & Co., 3 Ch. Div. 527 (1892), 5, 6, 29
Vermilye & Co. v. Adams Ex. Co., 21 Wall. 4, 6, 30

White Phillips Co. v. Graham, 74 Fed. 2nd 417 53
Ward v. City Tr. Co., 102 N. Y. Supp. 50 4
Wildsmith v. Tracy, 80 Ala. 258 5
Williams v. Drake, 9 Fed. Supp. 672 13
Wright v. N. Y. Und. Ins. Co., 1 Fed. Supp. 663 11

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CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT.

STATEMENT.

The statement of the case by petitioner, supplemented by the statement made by the Circuit Court of Appeals (Record pp. 144-146) seems to respondent sufficient. The facts of the case are fully and correctly stated by the Trial Court in the findings of fact (Trans. Rec. pages 105-108) down to Finding No. 10, which is not a finding of fact but conclusion of law.

The Position of Respondent.

A.

Respondent insists that upon the record here, the evidence was sufficient, as held by the Circuit Court of Appeals, to establish its right to the bonds as holder in due course, for value, in good faith, without evidence of any such notice of any defect in the title of Connolly at the time of the purchase, as, in the Federal Courts would be sufficient to impute bad faith or impair its status as a bona fide holder, and asserts that it carried the burden of proof of showing that it had not *actual knowledge* of any defect in Connolly's title, or *knowledge* of such facts that its action in taking them amounted to bad faith, and relies upon the law of commercial paper as laid down and administered in all courts save an intermediate court of Illinois, upon the question of the character of proof of knowledge which will impute bad faith to the purchaser of negotiable securities.

B.

Respondent insists that the decision and opinion of the Appellate Court of the First District of Illinois, not the highest court of that State, is not a construction of the Uniform Negotiable Instrument Act of Illinois, but is a mere decision upon an evidentiary matter.

C.

Respondent insists that this Court, even if it can be held that the decision of said intermediate court is a construction of the Illinois Statute, is not bound to follow it, because the denial of certiorari by the Supreme Court of Illinois (the highest Court of the State), does not make the decision of said intermediate court, the decision of the highest court of the State.

SUMMARY OF ARGUMENT AND AUTHORITIES IN SUPPORT THEREOF.

I.

The Uniform Negotiable Instruments Act, (and particularly Secs. 52, 56 and 59 of Art. IV), is merely declaratory of the common law.

Peterson v. *Metro. Life Ins. Co.* (Dist. Ct. So. Dist. Ia. 1926) 19 Fed. 2nd, 74 at 85.

Gerseta Corp. v. *W.-C. Silk Co.* (C. C. A. 2nd Circ. 1924) 3 Fed. 2nd 236.

Commercial Nat. Bank v. *Canal-Louisiana B. & Tr. Co.*, 239 U. S. 520 at 528.

City of Adrian v. *Whitney Cent. & Nat. Bank* (1914) 180 Mich. 171; 146 N. W. 654.

City Bank v. *Bank of Republic*, (1921) 300 Ill. 103 at 106.

Link v. *Jackson*, (1911) 158 Mo. App. 63; 139 S. W. 588 at 593.

Unaka Nat. Bank v. *Butler*, (1904) 113 Tenn. 574; 83 S. W. 655 at 657.

Campbell v. *Fourth Nat. Bank*, (1910) 137 Ky. 555; 126 S. W. 114 at 116.

Citizens State Bank v. *Johnson Co.*, (1918) 182 Ky. 531; 207 S. W. 8 at 10.

Bank of Commerce & Sav. v. *Randell*, (1921) 107 Neb. 332; 186 N. W. 70.

Ex parte Goldberg & Lewis, 191 Ala. 356.

Piedmont, etc., R. Co. v. *Shaw*, 223 Fed. 973 at 976.

State Bank v. *Bilstad*, (1912) ..... Ia. ..... 136 N. W. 204 at 205.

Arnd v. *Aylesworth*, (1909) 145 Ia. 185; 123 N. W. 1000 at 1002.

Mass. Nat. Bank v. *Snow*, (1905) 187 Mass. 159; 72 N. E. 959.

Fillebrown v. *Hayward*, (1906) 190 Mass. 472; 77 N. E. 45.

Union Tr. Co. v. *McGinty*, (1912) 212 Mass. 205; 98 N. E. 679.

Morris v. *Muir*, (1920) 181 N. Y. Supp. 913.

Ward v. *City Tr. Co.*, 102 N. Y. Supp. 50.

Drouineau v. *Bank*, 244 Ill. App. 251.

Chi. Auto Sales Co. v. *Peters*, 221 Ill. App. 363 at 367.

II.

Under the common law,—the Law Merchant,—adopted into the Uniform Negotiable Instruments Act in Section 56, (For statute, see Petitioner's Brief, pages 36-37), it was, and is present, actual knowledge of a defect in the title of the transferor, not past constructive notice of some such defect, which will render the act of the transferee in taking the paper bad faith to the extent of impairing his title.

(A) Uniform Negotiable Instruments Act, Section 56. Cahill's Illinois Revised Stat., 1933, page 1920, Paragraph 76.

Goodman v. *Symonds*, 20 How. 343.

Vermilye & Co. v. *Adams Exp. Co.*, 21 Wall. 138.

Merch. Nat. Bank v. *Detroit Tr. Co.* (1932) 258 Mich. 526; 242 N. W. 739.

Seybel v. *Nat. Cur. Bank*, 54 N. Y. 288.

Heney v. *Sutro*, (1915) 28 Cal. App. 702; 153 Pac. 972.

Gerseta Corp. v. *W. C. Silk Co.*, (C. C. A. 2nd Circ. 1924) 3 Fed. 2nd 236.

Link v. *Jackson*, (1911) 158 Mo. App. 63; 139 S. W. 588 at 593.

Lord v. *Wilkinson*, (N. Y.) 56 Barb. 593.

Beltzhoover v. *Blackstock*, (Pa.) 3 Watts 20.

Eng. Amer. L. & T. Co. v. *Hiers*, (Ga.) 38 S. E. 103.

Halliday v. *Elberton L. & S. Bank*, (Ga.) 128 S. E. 131.

Wildsmith v. *Tracy*, 80 Ala. 258.

Boyd v. *McCann*, 10 Md. 118.

Clark v. *Ricker*, 14 N. H. 44.

Hayden v. *Bowery Nat. Bank*, 6 Lans. 490.

Unaka Nat. Bank v. *Butler*, (1904) 113 Tenn. 574; 83 S. W. 655 at 656.

Peterson v. *Emery*, (1910) 154 Ill. App. 294, at 298.

Knolt v. *Cartwright*, (1916) 202 Ill. App. 502, 506.

Pollard v. *Toben*, 211 Wisc. 405, followed in *Marine Nat. Exch. Bank* v. *Kalt-Zimmers Mfg. Co.*, (1934) ..... U. S. .....; 79 L. ed. 208 at 210-11.

Mickey Bros. v. *Lonsdale Mfg. Co.*, (Tenn.) 257 S. W. 403; 149 Tenn. 1.

(B) This is and ever since 1836 has been the rule in the British courts.

Raphael v. *Bank of England* (1855), 17 C. B. 161;

Venables v. *Baring Bros. & Co.* (1892), 3 Ch. Div. 527, at 542.

London Joint Stock Bank v. *Simmons*, (1892) App. Cas. at pp. 219, 221 and 227.

(C) This Court, in 1874 held that this was "the well settled law of the case".

Vermilye & Co. v. *Adams Exp. Co.*, 21 Wall. 138.

(D) The original owner of stolen bonds, by circularizing dealers in negotiable securities of the fact of the theft, cannot impose an obligation upon such dealers to read, keep in mind or preserve or search his records for such notices previous to buying bonds offered.

The rule was established in *Vermilye & Co.* v. *Adams Exp. Co.*, 21 Wall. 138 at 146, as follows:

> "By the well settled law of the case, they" (dealers in negotiable securities) "may purchase such paper before due without cumbering their minds or their offices with the memoranda of such notices."
>
> *Raphael* v. *Bank of England*, 17 C. B. 161; 84 E. C. L. 161; 33 Eng. L. & Eq. 276.

A mere negligent mode of dealing with such circulars, resulting in ignoring the information as to stolen paper, is no evidence of *mala fides*, and actual *mala fides* must appear before the title of the purchaser will be affected.

> *Raphael* v. *Bank of England*, (1855) 17 C. B. 161; 139 Eng. Rep. 1030.
>
> Lord Field in *London Joint Stock Bank* v. *Simmons*, (1892) App. Cas. at 227.
>
> Lord Kekewich in *Venables* v. *Baring Bros. & Co.*, (1892) 3 Ch. Div. 527 at 542.

Save for the Illinois Appellate Court case (*N. W. Nat. Bank* v. *Madison & K. State Bank*, 242 Ill. App. 22), the *Vermilye case* has been approved and adopted in every instance where the question has arisen.

Seybel v. *Nat. Curr. Bank*, 54 N. Y. 288 at 302.

Heney v. *Sutro & Co.*, (Calif. 1915) 28 Calif. App. 702; 153 Pac. 972 at 974.

Merch. Nat. Bank v. *Detroit Trust Co.*, (1932) 258 Mich. 526; 242 N. W. 739 at 743.

Beltzhoover v. *Blackstock*, (Pa.) 3 Watts 20.

(E) The Federal rule as to proof of title to negotiable paper was laid down in 1864 and has prevailed ever since without modification.

That rule was thus summarized in *Murray* v. *Lardner*, 2 Wall. 110, at page 121.

> "The possession of such paper carries the title with it to the holder:—'The possession and title are one and inseparable'.
>
> The party who takes it before due for a valuable consideration, without *knowledge* of any defect of title, and in good faith, holds it by a title valid against all the world.
>
> Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. *That result can be produced only by bad faith on his part.*
>
> *The burden of proof lies on the person who assails the right claimed by the party in possession.*

Such is the settled law of this court, and we feel no disposition to depart from it".

Long Island L. & T. Co. v. *Columbus, C. & I. C. Ry. Co.*, 65 F. 455 at 459.

Hotchkiss v. *National Banks*, 21 Wall. 354.

Pridgen v. *Baugh & Sons Co.*, 30 Fed. 2nd, 353 at 355.

III.

While proof of defect in title of transferor casts the burden of showing good faith on the transferee, this burden is carried when the transferee shows that no person who was concerned in the purchase had actual knowledge at the time of the transfer of any defect in the title.

Hotchkiss v. *Nat. Shoe & L. Bank*, 21 Wall. 354.

Crittenden v. *Widrewitz* (Circ. Ct. App. 2nd Circ. 1921) 272 Fed. 871.

Pridgen v. *Baugh Sons & Co.* (Circ. Ct. App. 4th Circ. 1929) 30 Fed. 2nd 353 at 356.

Des Moines Sav. Bank v. *Arthur*, (1913) 163 Ia. 205; 143 N. W. 556 at 560.

First Nat. Bank v. *Dutton*, (1925) 199 Ia. 468; 202 N. W. 228 at 229.

Perry Sav. Bank v. *Fitzgerald*, 167 Ia. 446; 149 N. W. 497.

Robertson v. *U. S. Live Stock Co.*, 164 Ia. 230 at 234.

Johnson Co. Sav. Bank v. *Walker*, (1906) 79 Conn. 348; 65 Atl. 133.

Nat. Bank v. *Uptown State Bank*, (1934) 273 Ill. App. 401 at 404, 405.

In the very late case of *Merch. Nat. Bank* v. *Detroit Trust Co.*, (1932) 258 Mich. 526; 242 N. W. 739 at 743, the Court says:

> "In the instant case, the notice was received by the mailing clerk, but the three officers of the trust company deny that they received it or were made acquainted with its contents. We know of no reason why we should doubt their testimony. The record shows that they acted in good faith."

A jury cannot disregard the unimpeached testimony of the officer or agent who made the purchase, that he had no knowledge of any defect in the title of the transferor, and such testimony will compel the direction of a verdict in favor of the transferee.

Jerke v. *Delmont State Bank*, (1929) 54 So. Dak. 446; 223 N. W. 585 at 589.

Uncontradicted testimony that a bank acquired stolen paper, before maturity, for value and without notice of any infirmity of title authorized a directed verdict for the bank.

Emp. Liability Assur. Corp. v. *Greenfield*, (Pa. 1934) 175 Atl. 403.

IV.

In the absence of a construction of a State statute, dealing with the Law Merchant, by the highest court of the State;—

(A) Federal Courts, upon all questions of commercial law, exercise their own independent judgment, regardless of state rules, interpretations and decisions.

Swift v. *Tyson*, 16 Pet. 1 at 19.

Salem Tr. Co. v. *Manuf. Fin. Corp.* (1924), 264 U. S. 182 at 191, 192.

Presidio County v. *Noel-Young Bond Co.*, 212 U. S. 58 at 73.

Citizens Nat. Bank v. *Waugh*, (C. C. A. 4th Circ. June 3, 1935) 78 Fed. 2nd 325—Adv. Sheets Sup. 16, 1935.

Sears v. *Greater N. Y. Devel. Co.*, (C. C. A. 1st Circ. 1931) 51 Fed. 2nd 46 at 49.

Independent School Dist. v. *Rew*, (C. C. A. 8th Circ.) 111 Fed. 1 at 11.

25 Corpus Juris page 846, Section 185.

27 Ruling Case Law page 52, Section 58.

(B) This principle is applied to evidentiary questions of the Uniform Negotiable Instruments Act.

Peterson v. *Metro. Life Ins. Co.*, (Dist. Ct. So. Dist. Ia. 1926) 19 Fed. 2nd 74 at 84.

Jockmus v. *Claussen & Knight, Inc.*, (Dist. Ct. So. Dist. Fla. 1930) 47 Fed. 2nd 766 at 767.

(C) In the absence of an authoritative construction of a state negotiable instrument act by the highest court in the state, the duty of a Federal Court is to determine the question according to the accepted canons and in the light of the decisions of the courts of other states with respect to a like question of commercial law.

Burns Mortgage Co. v. *Fried* (1934) 292 U. S. 487; 78 L. ed. 939.

Marine Nat. Exch. Bank v. *Kalt-Zimmers Mfg. Co.* (1934) ..... U. S. .....; 79 L. ed. 208.

V.

The decision of the Appellate Court, First District, Second Division, State of Illinois, in Northwestern Nat. Bank v. Madison & Kedzie State Bank, 242 Ill. App. 22, will not be followed in the Federal Courts.

(A) Because the Appellate Court of the State of Illinois is not the highest court in the state. It is an "inferior appellate court" (Constitution of Illinois of 1870. Article VI, Section 11). Its opinions "shall not be of binding authority in any cause or proceeding, other than in that in which they may be filed." Cahill's Illinois Revised Statutes 1933, Chapter 37; Paragraph 49, page 918.

Hall v. *Main*, (Dist. Ct. East. Dist. Ill. 1929) 34 Fed. 2nd 528 at 530.

Corpus Christi Gas Co. v. *Corpus Christi*, (Dist. Court So. Dist. Tex. 1930) 36 Fed 2nd 972 at 973.

Wright v. *N. Y. Underwriters Ins. Co.*, 1 Fed. Supp. 663.

In re Gary, 281 Fed. 218.

Anglo-Am. etc. v. *Lombard*, 132 Fed. 721 at 741.

Fed. Lend Co. v. *Swyers*, 161 Fed. 687 at 691.

Trapp v. *Met. Life Ins. Co.*, 70 Fed. 2nd 976 at 979.

The fact that review of the decision of the intermediate court by the highest court of the state has been denied, thus making the *judgment* of the intermediate court final, does not have the effect of a decision of the highest court of the state so that the Federal Courts will follow it.

Cont. Secur. Co. v. *Interborough R. T. Co.*, (Circ. Ct. So. Dist. N. Y. 1908) 165 Fed. 945 at 959.

The denial of the writ of certiorari by the Illinois Supreme Court, does not have the effect of a construction of the State Statute by that Court.

It is not an affirmance of the views expressed in the opinion of the Appellate Court.

People v. *Grant*, 283 Ill. 391 at 397.

Minn. St. P. & S. S. M. Ry. Co. v. *Rack*, 279 U. S. 410 at 412; 73 L. ed. 766 at 768.

Hamilton Shoe Co. v. *Wolf Bros.*, 240 U. S. 251 at 258.

U. S. v. *Carver*, 260 U. S. 482 at 490; 67 L. ed. 463.

Hudson v. *Maryland Casualty Co.*, (C. C. A. 8th Circ. 1927) 22 Fed. 2nd 791.

"Nor can we assume approval" (of the decision of the intermediate court) "from the fact that a petition for certiorari was denied on February 13, 1934," by the United States Supreme Court.

In re F. & W. Grand 5-10-25 Cent Stores, (C. C. A. 2nd Circ. 1934) 69 Fed. 2nd 807 at 808.

(B) Because the opinion in that case is not (even if it can be considered as a decision by the highest court of the state, because of the denial of the certiorari), a construction of the Negotiable Instrument Act. It is merely a finding that certain evidentiary elements, present in that case, as a matter of fact, constituted notice.

The construction of a statute arises only where there is ambiguity or doubt or uncertainty in the language of the statute.

Michigan v. *Michigan Trust Co.*, 286 U. S. 334, 343.

"The phrase, 'construction of a statute,' as used in the new act, means to interpret, to elucidate and to define and declare a meaning of that which is obscure and uncertain and can have no application to a statute in which there is nothing doubtful or ambiguous in its terms."

Terre Haute & L. R. Co. v. *Erdel,* 158 Ind. 344; S. C. 62 N. E. 706 at 707.

25 R. C. L. 957-958.

Clayton v. *Colorado & S. R.,* 51 Fed. 2nd 417.

Mere application of a given state of facts to unquestioned and unambiguous provisions of a statute is not a construction of the statute, it is a fact finding.

Gulf Paving Co. v. *Atlanta,* 149 Ga. 114.

Stewart Dry Goods Co. v. *Lewis,* 7 Fed. Supp. 438 at 445.

Williams v. *Drake,* (Dist. Ct. E. Dist. Ill.) 9 Fed. Supp. 672.

Pana v. *Bowler,* 107 U. S. 529, 540.

The finding in the Illinois Appellate Court case relied upon by petitioner, that circularization conveyed "notice," is not a construction of the statute, nor is it an inference or holding of law, it is but a finding of fact.

"Likewise, whether one has notice of a certain fact is a question of fact and not of law (*Cramer* v. *Burkhalter,* 207 Ill. 34; *City of Decatur* v. *Besten,* 169 *id.* 340.) We are of the opinion, therefore, that the finding that the plaintiff in error bank had notice or was put upon notice of the fact of Callum's want of authority to issue a check of Paine, Webber & Co. to pay his personal indebtedness was the finding of an ultimate fact."

Paine v. *Sheridan Trust & Sav. Bank,* (Illinois Supreme Court, 1930) 342 Ill. 342 at 348.

(C) Because the Appellate Court case is contrary to the Federal rule as to what evidentiary facts constitute notice, and to the weight of British and American authority. As said by the Michigan Supreme Court, "This case stands alone".

Merch. Nat. Bank v. *Detroit Trust Co.*, (1932) 258 Mich. 526; 242 N. W. 739 at 743.

(D) Because the First Division of the Appellate Court, First District of Illinois, in 1934 held contra to the earlier case relied upon by Petitioner, from the Second Division of the same court.

Nat. Bank v. *Uptown State Bank*, 273 Ill. App. 401 at 405.

DISCUSSION OF THE PROPOSITIONS.

While desiring to shun the common error of counsel in magnifying the importance of the questions presented in their own causes, we feel that we are justified in the assertion that in the instant case there are questions of much more general and far reaching importance to the commercial world than in the majority of cases which come into the courts for consideration.

The necessity for universality throughout the entire country in the holdings of the Federal Courts upon important doctrines concerning dealings in commercial paper; the paramount function of the Federal Courts over State Courts in laying down these doctrines; the freedom of transfer from hand to hand of negotiable paper; the rights and duties of those dealing in such paper which may have been the subject of theft and the status of the transferee of paper which has been stolen from a holder, are all of vital importance to the unrestricted flow of such paper in the channels of trade, and to those bankers and brokers whose business it is to deal in such paper and thus keep liquid the credits both of the private and public corporation as well as of the individual business man.

Dealing in and ownership of such securities cannot be confined within state boundaries—negotiable bonds must have a nation-wide status as to all the incidents of transfer, so that those dealing in them may have an universal yardstick by which to measure the incidents of ownership and transfer, and the citizen of California who deals in such securities must not, when rightfully invoking the jurisdiction of a Federal Court, be required to subject his rights

to the varying doctrines of the Courts of a dozen or more other states as to quantum of proof which will affect a purchaser with "notice" or "actual knowledge" of infirmity of title, when a question arises concerning the validity of his title to his property, but, of necessity must have the right to resort to the Federal Courts, and to find there holdings, doctrine and established legal principles which are uniform wherever his right may be drawn in question in a controversy in which the Federal Courts have jurisdiction.

The principle has been well expressed by Sanborn J., in the Circuit Court of Appeals for the Eighth Circuit in *Independent School Dist.* v. *Rew*, 111 Fed. 1, at page 11:

> "It is not only the privilege, but the duty, of Federal Courts, imposed upon them by the constitution and statutes of the United States, to consider for themselves, and to form their independent opinions and decisions upon, questions of commercial or general law presented in cases in which they have jurisdiction, and it is a duty which they cannot justly renounce or disregard. Jurisdiction of such cases was conferred upon them for the express purpose of securing their independent opinions upon the questions arising in the litigation remitted to them.
>
> And a citizen of the United States who has the right to prosecute his suit in the national courts has also the right to the opinions and decisions of those courts upon every crucial question of general or commercial law or of right under the constitution or statutes of the nation which he presents."

See Respondent's Brief, p. 8, Sec. IV, *supra.*

Citizens Nat. Bank v. *Waugh*, (C. C. A. 4th Circ. 1935) 78 Fed. 2nd 325—Adv. Sheets.

The "crucial question" in this case is the evidence which is necessary to sustain the title of the transferee of a negotiable instrument, and the determination of this question involves the general law of commercial paper, the incidents of its transfer, the question of sufficiency of proof of bona fides of the transferee and what character of evidence of notice of an infirmity of title of the transferor will impair the title of the transferee.

It is true that Petitioner argues that the "crucial question" is a construction of the Negotiable Instruments Act of Illinois, and that that question is foreclosed here by a construction of that Act by an intermediate Appellate Court of Illinois, to which a certiorari was denied by the highest court of Illinois, but we submit, with deference, that we will demonstrate (1) that there was no construction of the Act, even by the intermediate court, and (2) that though it be thought that there was such a construction by that court, the denial of the certiorari by the highest court, did not make the decision of the intermediate court a construction by the highest court in the sense that this court is bound thereby.

All these questions which we class as crucial, are of general or commercial law, and as to these questions this Court will exercise its independent judgment, unless the contention of appellee shall prevail that the holding of the Second Division of the Appellate Court of the First District of the State of Illinois, as to the quantum of proof necessary to establish good faith under the Uniform Negotiable Instruments Law of the State of Illinois in *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, is of binding force upon this Court.

That such holding is not of even persuasive effect seems to be true for very well established reasons.

In the first place, it is only the decisions of the highest court of a state upon some question of construction of the statutes of that state which will be followed in the Federal Courts, and the Appellate Court of Illinois is not the highest court but merely an intermediate court, whose opinions, by the statute creating it "shall not be binding authority in any cause or proceeding, other than in that in which they may be filed." (Respondent's Brief of Law, *supra*, p. 10, Sec. V.)

In the second place, it is only a holding upon the construction of a state statute that the decision of the highest court of the state is binding upon the Federal Courts, and they will not be deemed bound by the decisions of state courts where no question of construction of a statute is passed upon but merely the evidentiary question of what facts proven will affect a purchaser of negotiable instruments with notice.

And thirdly, the Appellate Court, First District, First Division, has recently held the absolute opposite to the holding in the Second Division (Respondent's Brief, *supra*, p. 13.)

The question then arises as to whether the applicable sections of the Illinois Negotiable Instruments Law do not simply prescribe the elements which go to make up a holder in due cause, without laying down any rule as to the evidentiary facts which will be sufficient as a general common law principle, to establish the existence of those elements, and this first involves a consideration of what was the general law merchant with respect to the proof which would establish who were bona fide purchasers of negotiable paper before due, at and prior to the time of the adoption of the Uniform Negotiable Instruments Act by Illinois in 1907.

There can be little doubt, after a study of Federal as well as State decisions, that the doctrine approved and applied by the Supreme Court of the United States in 1864, in the case of *Murray* v. *Lardner*, 2 Wall. 110 at 121, settled the Federal law upon the lines laid down in 1842 in *Swift* v. *Tyson*, 16 Pet. 1, and expanded in 1857 in *Goodman* v. *Simonds*, 20 How. 343, and was the general law merchant of practically the entire country at the time of the adoption in Illinois of the Uniform Act.

That rule was summarized in *Murray* v. *Lardner*, 2 Wall. 110, at page 121 in the language of our quotation from the opinion of Mr. Justice *Swayne* found at Sec. II, E. of the Brief.

The elements and conclusive indicia of title as declared in that case are,

1. Possession in transferee.
2. Transfer before due.
3. Giving a valuable consideration.
4. Absence of knowledge of any infirmity of title of transferor.
5. Good faith of transferee.

In the instant case, Elements 1, 2 and 3 are admitted, but the claim of petitioner is that respondent does not bring itself within Elements 4 and 5, and to sustain the claim petitioner relies upon the proof of delivery of the mimeographed notice of the theft at the Davenport office as attributing actual *knowledge* of the defect in title of Connolly, the transferor, to the transferee, and as stamping the transaction as not in good faith.

To arrive at the condition of the law merchant with respect to these matters we need but refer to the cases already mentioned.

And first as to the definition of the Courts as to what is meant in the cases by the word "notice", as implying "knowledge".

In *Goodman* v. *Simonds*, 20 How. at 365, it is said:

> "If a bill of exchange, endorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no *knowledge* of these facts, for a valuable consideration in the usual course of business, his title would be good, and he would be entitled to recover the amount. • • • The word *notice*, as used by this Court on the occasion referred to, we think must be understood in the same sense as *knowledge*, and indeed that is one of its usual and appropriate significations. • • • (p. 366).
>
> But it is a very different matter when it is proposed to impeach the title of a holder for value, by proof of any facts and circumstances outside the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had *knowledge* of such facts and circumstances at the time the transfer was made.
>
> Nothing less than proof of *knowledge* of such facts and circumstances can meet the exigencies of such a defense. • • • (p. 367)

According to the rule laid down in *Goodman* v. *Harvey*, which indubitably is the settled law in all the English Courts, proof that the plaintiff had been guilty of gross negligence in acquiring the bill, ought not to defeat his right to recover; and if not, it serves to exemplify the magnitude of the error assumed in the

instruction, that any facts and circumstances which ought to excite the suspicion of a careful and prudent man were sufficient to destroy the title. It is clear that one or the other of these rules must be incorrect; both cannot be upheld. Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; *and if such neglect would not defeat the right to recover—and clearly it would not, unless attended by bad faith—it cannot require any farther reasoning to demonstrate that the instruction was erroneous*".

The second criterion of validity of title which is a matter of controversy depends (at common law) upon the judicial pronouncements of what is sufficient evidence of "good faith". Respondent contends that its purchase of the bonds was not only without knowledge of any infirmity of title, but also that its purchase was in good faith. Petitioner has contended that bad faith should be inferred from the office system and practice of respondent in regard to notices of stolen bonds, that is, from negligence.

Under the law merchant, as administered by Federal and practically all other Courts at the time of the adoption in Illinois of the Uniform Negotiable Instruments Law, there was a unanimity of opinion as to what was and what was not sufficient evidence of good faith in the transaction which culminated in the purchase of a negotiable instrument.

Good faith cannot be impugned by proof of a suspicion of a defect in the title, or by knowledge of circumstances that might excite suspicion in the mind of a cautious person or even by gross negligence.

The only proof which will be sufficient to show bad faith is that which implies guilty knowledge or wilful ignorance.

Hotchkiss v. *Nat. Banks*, 1 Wall. 354 at 359.

As far back as 1895, the Supreme Court of Illinois in *Crouch* v. *First Nat. Bank*, 156 Ill. 342 at 357, adopted Anderson's definition, saying:

> "Good faith means 'honest, lawful *intent;* the condition of acting without knowledge of fraud, and without *intent* to assist in a fraudulent or otherwise unlawful scheme' ".

"Wilful ignorance", as used by the United States Supreme Court in the *Hotchkiss case*, of course, includes the same element of intent which is included in Anderson's definition, and mere gross negligence does not supply the element of intent.

Mr. Justice Cartwright shows the necessity for *intent* in any charge of wilfulness by his language in *C. R. I. & P.* v. *Hamler*, 215 Ill. 525 at 540:

> "But to warrant punishment there should be an actual or constructive intent to inflict the injury. Negligence and wilfulness are as unmixable as oil and water".

And Salmond says:

> "No result which is due to carelessness can have been also intended. Nothing which was intended can have been due to carelessness".
>
> Salmond on Jurisprudence, 7th Edition, page 409.

Ignorance brought about by negligence, no matter how gross, cannot be "wilful ignorance", for the epithet "wilful" connotes purpose or intent, and the fixed doctrine of

the Federal Courts is that even gross negligence of the purchaser of negotiable paper is not sufficient to authorize the inference of intent which is essential to that bad faith which will invalidate the title of the purchaser.

The definition of "good faith" adopted by the California Court in *Heney* v. *Sutro* (1915), 28 Calif. App. 702, 153 Pac. 972, from the case in Illinois (*Crouch* v. *First Nat. Bank*, 156 Ill. 342), is further elaborated by the Circuit Court of Appeals for the Second Circuit in *Gerseta Corp.* v. *W.-C. Silk Co.* (1924), 3 Fed. (2nd) 236, quoting from an opinion of Honorable William G. Choate in *Ward* v. *City Tr. Co.*, 102 N. Y. Supp. 50, in which the point was made that Section 95 of the Uniform Negotiable Instruments Act of New York (Section 56 of the Illinois Negotiable Instruments Act):

> "Is merely the declared rule of many courts, including those of New York, made into a statute; and that rule is that the notice of a defect or want of power in the transferor * * * to make a valid transfer must be a *knowledge* of such facts on the part of the transferee that his action in taking the instrument amounted to bad faith, *i. e.*, to dishonesty and absence of fidelity to the obligations of morals and honor".
>
> *Chi. Auto Sales Co.* v. *Peters*, 221 Ill. App. 363 at 367, citing *Bradwell* v. *Pryor*, 221 Ill. 602 at 605.

The Uniform Negotiable Instruments Act is but declaratory of the elements which go to make a holder in one cause, and does not deal with questions of sufficiency of evidence.

The sections of this act which are germane to the instant controversy are 52 and 56 of Article IV, which are as follows:

> "Holder in Due Course Defined. Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:
>
> 1. That the instrument is complete and regular upon its face.
>
> 2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.
>
> 3. That he took it in good faith and for value.
>
> 4. That at the time it was negotiated to him he had no *notice* of any infirmity in the instrument or defect in the title of the person negotiating it.
>
> Notice of Infirmity—What Constitutes. Sec. 56. To constitute *notice* of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had *actual knowledge* of the infirmity or defect, or *knowledge* of such facts that his action in taking the instrument amounted to *bad faith.*"
>
> Cahill's Illinois Revised Statutes (1933), p. 1919.

That the framers of this act had in mind the law merchant as previously administered, and merely restated the law, using terms which then had a fixed and universal

meaning in that law, and had no design or purpose to change the law as it then existed, is most clear.

Chi. Auto Sales Co. v. *Peters,* 221 Ill. App. 363 at 367.

In defining "notice" as used in Section 52, the common law definition is imported into Section 56 by the use of the words "actual knowledge" and again the word "knowledge" is used in the phrase "or knowledge of such facts that his action in taking the instrument amounted to bad faith".

The phrase "bad faith" not being defined, it was the clear purpose of the drafters of the act that those words should have the signification which had theretofore been given to them by the Courts in the administration of the general or commercial law.

In every instance which we have been able to find in which the Courts have had occasion to consider these sections of the act, it has been held that they are declaratory of the law merchant, and not in derogation thereof.

Proposition I, Respondent's Brief, *supra*, page 3.

We submit, therefore, that this Court will not consider itself bound to follow the Second Division of the Appellate Court of the First District of Illinois in its opinion in *N. W. Nat. Bank* v. *Madison & Kedzie State Bank,* 242 Ill. App. 251, which case, the Supreme Court of Michigan, as late as June, 1932, characterized as one which, on the question here involved, "stands alone".

Merch. Nat. Bank v. *Detroit Trust Co.,* 258 Mich. 526, 242 N. W. 739 at 743.

The delivery of the notice of stolen bonds and the ignoring of it by an established office custom attributes neither knowledge nor bad faith.

The contention of petitioner would enable everyone who has had a negotiable instrument stolen from him, to force every dealer in such securities to be an insurer of his title by merely broadcasting through the mails printed or mimeographed notices of the fact of the theft. It would impose upon dealers in such securities an onerous duty and an imminent peril which would so hamper legitimate dealers in their transactions as to impair the liquidity and transfer of bonds to an unreasonable extent.

In other words one who is about to buy a bond, in order to get good title, must require an abstract of title from the transferor, as in the case of real estate.

In a case involving the title of a purchaser of a stolen bond Judge Baker in the Circuit Court of the District of Indiana, said in 1895:

> "Such negotiable bonds, in a certain sense are the representatives of money, and freely pass by delivery in the money markets of all commercial countries. To accomplish this purpose, the holder of a perfected bond must be deemed to be the true owner, and be able to invest an innocent purchaser for value and before maturity with an unimpeachable title. The title of a bona fide holder of such a bond ought to stand on as secure a foundation as that of a person who receives a bank note in the ordinary course of business. *Any other doctrine would, in my judgment, undermine the structure of commercial law, and shake the foundations of such paper credits*".
>
> *Long Island L. & Tr. Co.* v. *Columbus, C. & I. C. Ry. Co.*, 65 Fed. 455 at 457.

The English Courts, after abandoning in 1836, the discredited rule laid down in *Gill* v. *Cubitt*, 3 Barn. & Cress, 466, by the opinion of Lord Denman in *Goodman* v. *Harvey*, 4 Ad. & El. 870, have consistently ruled in such manner as to establish the free flow of negotiable paper and to disburden purchasers from fear of attack on their titles based on their negligence, even though gross, and since *Goodman* v. *Simonds*, 20 Howard, 343, was decided by the United States Supreme Court in 1857, the universal trend in the United States has been to free the transfer of negotiable paper from all shackles except those of bad faith growing out of actual present knowledge of the purchaser at the time of the purchase of a defect in the title of the seller.

The question of the obligation imposed upon dealers in securities by notices of theft arose in England at an early day in *Raphael* v. *Bank of England* (1855), 17 C. B. 161; 139 Eng. Reprint 1030.

In that case, Bank of England notes had been stolen and the original owner circularized a large number of bankers and brokers, one of whom, after receiving the circular, changed the notes.

An action was brought by the former holder of the notes, and in that action the transferee testified:

> "That it was the practice of the house to file all notices of stolen or lost notes served upon them and to look at them if the amount was important; but that on this occasion, he did not look at the file, and had no recollection of the notice, or he would not have taken the note".*

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*Compare Findings of fact by trial Court Numbers 8 and 9. (Rec. 107-108).

Counsel for the former owner contended that such conduct was so negligent as to amount to *mala fides* and invalidate the title of the transferee.

As is often the case in the English reports, the questions of the Judges to counsel in the course of the argument were as illuminating as the final opinions themselves.

During the course of the argument in favor of the proposition that disregard of the notice invalidated the title, *Jervis, C. J.*, asked counsel, "Suppose a man serves me with a notice that a certain bank note for 500£. has been stolen, and afterwards I, bona fide and in the course of business, change the note, giving full value for it in money —what is there to disentitle me to recover on the note?"

Cresswell J. asked, "What is the obligation that is cast upon the money changer from the receipt of a notice of this sort a year ago? Is his want of recollection of the notice *mala fides*?"

Crowder, J., asked, "Suppose, in going over the file, the notice had escaped St. Paul's attention—would that have negatived his right to recover?"

Jervis, C. J., asked, "Were those circumstances of suspicion to outweigh the fact of St. Paul's having given full value, and his want of knowledge of the loss at the time he took the note?"

The four judges were unanimous in the opinion that the taker of the note had good title, despite the notice of the theft.

Willes, J., in his opinion, said:

> "But, even if those gentlemen" (members of the jury seeking to impeach their verdict on the ground of misapprehension), "had at the time the verdict was being delivered, audibly expressed what they now say, it would have made no difference; for all they say

amounts to only this,—that notwithstanding St. Paul paid the full value for the note, and was ignorant at the time that it had been stolen, he was not entitled to be considered as a bona fide holder; that is *that his negligent mode of conducting his business disables him from being the bona fide holder in the particular case. That is, in truth an attempt to revive the exploded doctrine of Gill* v. *Cubitt*".

In *London Joint Stock Bank* v. *Simmons* (1892), App. Cas. at 219, Lord Herschell approves the opinion of *Willes, J.*, and at page 221 says:

"I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments".

Lord Field, in the same case, cites the *Raphael case* with approval, and says (page 227):

"In one of those cases, *Raphael* v. *Bank of England*, the plaintiff had, at some earlier period, received actual notice that the bank note in question had been stolen, but it was established to the satisfaction of the jury that the notice had been forgotten and was not present to his mind at the time of taking, and he was held entitled to recover."

In *Venables* v. *Baring Bros. & Co.*, (1892) 3 Ch. Div. 527, *Lord Kekewich*, said at page 542:

"Now I come to the question of negligence. I was referred to the case of *Raphael* v. *Bank of England*, 17 C. B. 161, which is certainly a case in point; because there was a bank note—undoubtedly a negotiable instrument—and it was held that the holder might sue upon it, *notwithstanding that when he took it he*

> *had the means at his disposal which would have enabled him to detect the bad title of his transferor; but of which means he neglected to avail himself.* Negligence was there held to be no defense whatever, and I apprehend that principle is really the guide to all the decisions."

In the interim between the *Raphael case*, decided in 1855, and the *London Joint Stock Bank case*, decided in 1892, the Supreme Court of the United States in 1874, had occasion to consider the question of bona fides of a purchaser of stolen securities in *Vermilye & Co.* v. *Adams Exp. Co.*, 21 Wall. 138.

In that case the securities in question were *past due* paper, and notice of the theft had been delivered to Vermilye & Company before that company purchased the paper.

The Court held that Vermilye & Company acquired no title because the fact the paper was *past due* was enough to put them on inquiry, and obligate them to refer to their files to ascertain whether there had been any notice affecting the paper served upon them, but the Court said:

> "By the well settled law of the case they" (bankers) "may purchase such paper *before due* without cumbering their minds or their offices with memoranda of such notices."

The *Raphael case* is not referred to, but it seems clear that the Supreme Court had that case in mind as being "the well settled law of the case."

It may be insisted here, as it was below, that the expressions in the *Vermilye & Company case* were mere dicta which this Court should disregard as did the Chancellor below.

In a sense, perhaps, the expressions in the *Vermilye & Company case* were dicta in that what was said was not absolutely necessary to the decision of the case, but there are two classes of dicta—*obiter dicta* and judicial dicta. The first being remarks of a Judge as argument or illustration drawn from some collateral question, and of little or no value as precedent, but the second being the deliberate language of the whole Court, used in expressing principles involved in the determination of the cause.

That eminent Wisconsin jurist, Cassoday J., has considered the question of dicta with his accustomed thoroughness in *Buckner* v. *C. M. & N. W. Ry.*, (1884) 60 Wis. 264; 19 N. W. 56 at 57.

> "It would seem that judges, as well as lawyers, sometimes differ as to what may properly be regarded as *obiter dictum*. It is not unfrequent, in courts of last resort, composed of several judges, for all to come to the same conclusion, but from different views of the law; and hence it may at times be difficult to determine the precise principle upon which the case was decided, or what may properly be deemed mere *obiter*. 'According to the more rigid rule' says Bouvier, 'an expression of opinion, however deliberate, upon a question, however fully argued, if not essential to the disposition that was made of the case, may be regarded as a dictum'.
>
> Under this 'more rigid rule', it is believed that, comparatively, there are few opinions in the books, which contain no *obiter dictum;* that is, nothing which was not absolutely essential to the disposition made of the case. Under that rule what is here being written is nothing but *obiter dictum*. But Bouvier adds that 'it is, on the other hand, said that it is difficult to see

why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause, that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung on but one point.'

Such dictum, if dictum it is, should it would seem, be regarded, as '*judicial dictum*', in contradistinction to mere *obiter dictum;* that is, an expression originating with the judge alone, while passing by the way, in writing his opinion, as an argument or illustration drawn from some collateral question."

In *Taylor* v. *Taylor,* (1931) 162 Tenn. 482; 40 S. W. 2nd 393 at 394, it is said:

"But, even though not essential to the decisions of the case, a statement in the opinion upon a point even incidentally involved, where apparently made with consideration and purpose, is at least a judicial dictum, as distinguished from mere *obiter dictum,* and is entitled to much weight. Moreover, insofar as an opinion *announces principles as a basis for the decision, it is in no sense dictum.*"

Union Pac. Co. v. *Mason City Co.,* 199 U. S. 160 at 166.

But whether the expressions in the *Vermilye & Company case* be considered as judicial dictum or as mere *obiter dictum,* there can be no question that the language of the Court, "By the well settled law of the case," indicates a more than passing or careless attention of the Court, and shows a judicial reflection upon the contra-distinguishing considerations between the rule as to obligation of the pur-

chaser as to inquiry when the paper is past due and not yet matured.

In at least two jurisdictions, the courts of last resort have considered the language in the *Vermilye & Company case* as *stare decisis* and not as dictum.

In *Heney* v. *Sutro & Co.*, (1915) 28 Calif. App. 702; 153 Pac. 972 at 974, there was a controversy as to the title to stolen securities, and it appeared that a circular notifying of the theft, had been delivered at the office of the purchaser prior to the transaction. In discussing the legal effect of such a notice, the Court said:

> "The fact that the defendant had at one time received notice of the plaintiff's loss was not sufficient of itself to fasten liability upon the defendant for the conversion of the bond in the presence of evidence tending to show that at the time of its purchase the defendant did not have in mind the plaintiff's ownership and loss. The failure of the defendant to keep and refer to a record of the plaintiff's loss as detailed in the notice given to the defendant's cashier is of no consequence in determining the relative rights of the parties to the action.
>
> *The defendant was under no legal obligation to incumber either its memory or the minutes of its business with a record of notices given to it of the loss of immature negotiable commercial paper.* (*Vermilye* v. *Adams Express Co.*, 21 Wall. 138, 22 L. Ed. 609), and therefore, notwithstanding the notice to its cashier, 'the defendant may well have purchased the bond in suit in good faith, for 'it is sufficient to constitute good faith that the holder has *no knowledge of the defect of title at the time when he took the instrument, although he may have had notice at some previous time.*" (Storey on Promissory Notes, p. 269, note.)

The California Court also cites as "precisely in point," *Raphael* v. *Bank of England*, 17 C. B. 161, from which we have heretofore quoted.

It is interesting to note that in the Illinois Appellate Court case, which petitioner insists should be followed by this Court, none of the pregnant English cases, the United States Supreme Court case nor the California case seem to have been brought to the attention of the Court, for they are not referred to in the opinion in 242 Ill. App. 22, perhaps upon the palpably erroneous idea of that division of the Illinois Appellate Court that the Uniform Negotiable Instruments Law had in some manner changed the established law merchant with respect to evidence which will establish the essentials of notice, knowledge and good faith.

It is also very significant, in considering the Illinois Appellate Court case (*N. W. Nat. Bank* v. *Mad. & Ked. State Bank*, 242 Ill. App. 22), that the same Court, speaking from the First Division, by *O'Connor, J.*, concurred in by *Matchett, P. J.* and *McSurely, J.*, on February 5, 1934, rehearing denied February 19, 1934, holds diametrically opposite upon the question of circularization, from the Second Division's opinion rendered October 5, 1926, by *Barnes, J.*, concurred in by *Gridley, P. J.*, and *Fitch, J.*

Nat. Bank v. *Uptown State Bank* (Adv. Sheets) 273 Ill. App. 401.

The later case does not even refer to the former opinion in the Second Division, but ignoring it, apparently as a judicial blunder of their brethren, holds that good faith of the purchaser cannot be impugned by proof of circularizing the theft of bonds, when the evidence of the official who actually made the purchase is that he had no knowledge of the theft or of the circular.

The question was sharply raised in the argument of counsel, the Court saying at page 404, that the plaintiff contended among other things, that before the bonds were purchased,

> "defendant was advised by the Illinois Bankers' Association through the mail that the bonds had been stolen and therefore defendant was not a bona fide holder in full."

The Court denied the contention upon this point, and followed the general law of commercial paper as construed by the Federal Courts, citing Sections 52 and 56 of the Illinois Uniform Negotiable Instruments Law. As to the disapproved contention the Court says (pp. 404, 405):

> "There is evidence in the record that the Illinois Bankers' Association mailed to its members, including plaintiff and defendant, a typewritten bulletin under date of April 4, 1930, the third item of which stated that it had been reported that the bonds in question had been stolen. But the evidence does not show specifically that a copy was mailed to defendant. *But even if the evidence might be held sufficient on this point,* defendant's cashier, who had the transaction with Farry, testified that he did not know anything about the bulletin and had received no information that the bonds were stolen. Obviously, he would not have taken the bonds as collateral if he had been advised that they had been stolen. *It is clear that defendant, through its cashier, acted in good faith in accepting the bonds as collateral. This is all the law requires. Bradwell* v. *Pryor,* 221 Ill. 602; *Chicago Auto Sales* v. *Peters,* 221 Ill. App. 363; *Chicago Bank of*

Commerce v. *Kraft*, 269 Ill. App. 295; Secs. 52 and 56, ch. 98, Cahill's 1933 Statutes, Pars. 72, 76."

Nat. Bank v. *Uptown State Bank*, (Ill. App. Court, 1st Division, 1st Dist. Feb. 5, 1934) 273 Ill. App. 401 at 405. Advance Sheets, March 15, 1934.

The most recent case in a court of last resort upon the question now under consideration is *Merchants Nat. Bank* v. *Detroit Trust Company*, (Mich. 1932) 258 Mich. 526; 242 N. W. 739, and that Court considers the language of the United States Supreme Court in the *Vermilye & Company case* as *stare decisis* and not dictum.

The Michigan Court asks itself the question, Was the evidence sufficient to establish the defendant a holder in due course under sections of the Michigan Uniform Negotiable Instrument Act, which are Sections 52 and 56 of the Illinois Act.

The action was by the former owner to recover negotiable unmatured bonds which had been stolen from him, from a dealer who had acquired the bonds as collateral to a loan to the thief.

The same procedure as to sending out notices of the theft to bankers and dealers which was pursued in the case at bar had been adopted, and there was proof of mailing such a notice to the purchaser (defendant).

The Court held that proof of the mailing raised a presumption of delivery, and also held that the burden was on the purchaser to prove that it was a holder in due course.

The Court said:

"All of the officers of the defendant company having to do with the loan in question testified that they

did not see the notice and had no knowledge of it or of any circumstance tending to show a defect in the title to the bonds. According to the defendant's custom, mail addressed to the Detroit Trust Company and not to any particular person or department was opened by one of the mail clerks and sent to the person in charge of the business to which it related. Following this custom, the plaintiff's notice, if received in the mailing department, would be sent to Mr. Butler, Vice President in charge of the financial department, then to Mr. Miller, Assistant Treasurer, and finally to Mrs. Irving, collateral loan teller. All of these officers had a part in the loan for which the bonds were accepted as collateral. *We have no reason to doubt their testimony that they did not see or receive the notice. But, assuming that it was received, that they saw it and forgot about it or carelessly mislaid it so that it was not in their minds at the time they acquired the bonds, or assuming that it was received but through the carelessness of the mailing clerk it was not brought to the attention of the officers, how would these facts affect the company's title as holder in due course.*"

It is not often that the facts of a case presented for decision to a Court are so closely paralleled by the facts in a case decided by a Court of last resort as do the facts in the case at bar with those in the Michigan case, and we believe this parallel occurs because, as is shown by the record, and by the cases which we have cited, it is the universal custom among those dealing in commercial paper, relying on the law merchant as laid down in the *Vermilye & Company case*, not to encumber their files or their memories with these wails of distress from losers of negotiable paper, because it would be impossible to carry

on their business, as a practical matter, if, whenever a piece of unmatured paper was presented for sale, the law required a search of the files to ascertain whether, at some past time, a notice had been received that the particular bond or what not, had been stolen.

The Michigan Court answers its own question in the affirmative, holding that the evidence was sufficient to establish that the purchaser, even granting that the notice was received, was a holder in due course because there was no

> "evidence in contradiction of the officers that they did not see the notice or acquire knowledge of its contents" (242 N. W. 742).

In support of its conclusion, the Court relies among other authorities, upon *Vermilye & Co.* v. *Adams Express Co.*, 21 Wall. 138, and there seems to have been no contention that the language relied upon was dictum and not *stare decisis.*

The Illinois Appellate Court case (*N. W. Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22), is discussed by the Michigan Court and dismissed with the following comment (242 N. W. 743):

> "As far as we have been able to determine this case stands alone. It estops the purchaser from showing good faith at the time the bonds are acquired. It makes notice of theft conclusive evidence of *mala fides. It overlooks* the well established rule" (*i. e.*, the rule in the *Raphael case*, which was evidently before the United States Supreme Court in the *Vermilye & Co. case*), "'that, though one has received actual notice, if, by forgetfulness or negligence, he does not have it in mind, when he acquires the bonds, he may still be a good faith purchaser.'"

The Court then cites and quotes from *Lord* v. *Wilkinson*, 56 Barb. (N. Y.) 593, in which it was held that an instruction "that the defendants once having had notice, are bound by it, although the notice may have been forgotten", was erroneous.

The case of *Seybel* v. *Nat. Currency Bank*, 54 N. Y. 288, cited in the Michigan case, does not cite the *Vermilye & Co. case*, but it contains an elaborate discussion of the doctrine of good faith in a case involving the title to stolen securities, and holds, after elaborate discussion, that there is left no remnant of the doctrine that the negligence of the purchaser, even gross, would invalidate his title.

On page 302, as to notices of theft, the Court says that it must

> "Be deemed to be the settled law that the defendant was under no obligation to make any inquiry of the person who offered the bonds in question for sale as to his right or title thereto, or to take any special precautionary measures in the purchase of securities by which the interest of other parties should be protected; and if it could be deemed chargeable with want of caution or even negligence in the omission of its cashier or any of its officers to take up and read the notices of the theft that were left on its desks, it was not by reason of such omission alone deprived of the protection of a bona fide purchaser."

The denial of certiorari by the Supreme Court of Illinois, does not have the effect of a decision of the highest court, construing the Uniform Negotiable Instrument Act as petitioner claims it was construed in the Appellate Court in the case of Northwestern Nat. Bank v. Madison & Kedzie State Bank (supra).

The major dependence of Petitioner in this Court is placed upon the proposition enunciated in *Burns Mortgage Company, Inc.* v. *Fried*, 292 U. S. 487 and *Marine National Exchange Bank* v. *Kalt-Zimmers Manufacturing Company, et al.*, ... U. S. .....; 79 L. Ed. 208, to the effect that Federal Courts are bound by the decision of the highest court of a state construing a state statute even though such statute is but declaratory of the common law.

Petitioner then asserts that the case of *North Western Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, by reason of the denial of certiorari by the highest court of Illinois (the Supreme Court) has become a construction of the state statute by the highest court and that this Court is bound thereby.

Two misconceptions, we submit, are at the foundation of that position.

First. The question decided by the Appellate Court was not a question of statutory construction, but a question of fact, *i. e.* the factual inference from the receipt of the circular that the purchaser of the paper in that case had knowledge or notice of the infirmity of the title of the seller.

Second. The denial of certiorari by the highest court of Illinois, does not make the decision of the Appellate (intermediate) Court such a decision as will foreclose this

Court from using its own independent judgment upon a question either of commercial law, or statutory construction.

First.

In the case of *Burns Mortgage Co.* v. *Fried, supra*, the question was whether a certain instrument was negotiable, and the Florida Supreme Court had construed the Uniform Negotiable Instruments Law adopted in Florida, in such manner that the instrument was negotiable. This was pure construction of uncertain language of the statute, and this Court considered itself bound by the construction.

The same question of negotiability recurred in *Marine Nat. Exchange Bank* v. *Kalt-Zimmers Manufacturing Co., supra*, and this Court held that inasmuch as the highest court of Wisconsin had so construed Wisconsin's statute as to render the particular instrument negotiable, this Court was bound by such construction of the language of the statute.

Also in the latter case, the Wisconsin Court's adherence to the rule in *Murray* v. *Lardner*, 2 Wall. 110, 121 was "accepted as the law of the Wisconsin Court."

The Illinois Appellate Court case, upon which Petitioner relies as a construction of the Negotiable Instruments Act by the highest court of Illinois to the extent of foreclosing this Court from exercising its independent judgment upon a question of commercial law, neither construes nor interprets any ambiguous or uncertain language of the Act. It simply accepts the language used as defining holder in due course in Section 52 and as defining notice of infirmity in Section 56 as unambiguous, plain and certain, and then finds as an ultimate fact, upon the evidentiary facts, that in that case there was sufficient evidence to justify the

factual inference that the purchaser of the paper had notice of an infirmity of the title of the person negotiating it, (Sect. 52 of the Illinois Act), and that the evidence was sufficient to authorize the factual inference that the transferee had actual knowledge of the infirmity or defect, (Sect. 56 of the Illinois Act).

It is merely the holding of the Appellate Court that in its opinion, under the unambiguous language of the act, whether it be declaratory of the law merchant, or in derogation thereof, the receipt of the notice of the theft by the mailing clerk, authorized the *factual* conclusion that the transferee had actual knowledge, and consequently was charged with notice.

The Illinois Negotiable Instruments Act had laid down a rule of legal liability, *i. e.*, that if the transferee had "actual notice" of the infirmity of the title he was not a bona fide purchaser. The statute does not pretend to prescribe what facts proven will justify the conclusion of ultimate fact that there was notice.

The holding of the Illinois Appellate Court does not construe the statute, it merely holds that the statute provides that "actual notice" will invalidate the title, and then makes an inference from the fact of receipt of the circular, and from the law of agency, that there was "actual notice". This is not an interpretation or construction of the Act by which a Federal Court will be bound, but is an inference of fact from evidence (*i. e.*, that there was notice).

The Supreme Court of Illinois has recently reiterated in *Paine* v. *Sheridan Trust & Savings Bank* (1930), 342 Ill. 342 at 348 that "whether one has notice of a certain fact is a question of fact and not of law," and of course, the only question passed upon by the Illinois Appellate Court in the case relied upon by Petitioner was whether the fact of notice was properly inferable from the evidence that a

circular advising of the theft had been received in the office of the transferee.

"It has been held that, where constructive notice is to be determined by the circumstances of a particular case, it is ordinarily a question of fact for the jury; that whether a party has notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and whether 'by prosecuting such inquiry, he might have learned such fact,' are questions of fact." 46 Corp. Jur., Title Notice, p. 569, § 112.

In the case of *Paine* v. *Sheridan Trust & Savings Bank*, *supra*, may also be found the reason for the Supreme Court's denial of certiorari in the Appellate Court case relied upon by Petitioner, which reason is a far cry from the contention of Petitioner that by such denial the decision of the Appellate Court became the decision of the Supreme Court as a construction of the statute binding on this Court.

Under the Illinois Practice Act in force at the time of the denial of the certiorari in the Appellate Court case relied upon by Petitioner, it was provided:

"§ 122. The Supreme Court shall re-examine cases brought to it by appeal or writ of *certiorari* as provided in this Act, from the Appellate Courts, as to questions of law only; and in the cases aforesaid, no assignment of error shall be allowed calling in question the determination of the inferior or appellate courts upon controverted questions of fact therein." Cahill's Illinois Revised Statutes (1931), Chapter 110, Section 122, page 2189.

Undoubtedly, when the record in *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, went to the Supreme Court with the petition for certiorari, that

Court discerned at once that the only question involved was a determination of the Appellate Court upon a controverted question of fact, viz., the question of notice which the Supreme Court has always held to be a question of fact.

In *Paine* v. *Sheridan Trust & Savings Bank, supra*, the Supreme Court allowed a certiorari to review the judgment of the Appellate Court, which reversed a judgment of the trial court, and the question arose, whether there was such notice of infirmity of title in the transferee of a check as under Sects. 52 and 56 of the Negotiable Instruments Act, would prevent the transferee from being a holder in due course.

The Appellate Court had held in reversing the judgment of the trial court, "that defendant bank had notice or was put upon notice of these facts," (342 Ill. at 346)

The Supreme Court states, "The question here concerns the effect of this finding of fact on this appeal." (p. 347). After discussing the law of Illinois as to whether notice is a question of law or fact, and concluding that it was a question of fact, the Court says (p. 348), "This court is barred by the finding of fact of notice if there is any substantial evidence to support such finding."

After considering the evidence in the record as to notice, the Court says, (p. 349):

> "We have referred to this evidence in the record to show that there existed therein substantial evidence to support the Appellate Court's *finding of fact* that the plaintiff in error bank was not a holder in due course as defined by the Negotiable Instruments Act. *That issue is therefore not open for further consideration here, and as it is the ultimate fact on which the case of the plaintiff in error bank is bottomed, the judgment of the Appellate Court will be affirmed.*"

In the case in the Appellate Court relied upon by Petitioner, the question was the same, *i. e.*, whether on the evidence the transferee had notice of an infirmity of title in the transferor. The Appellate Court found as a fact that there was such notice, and the case turned upon this question of fact, and was decided by the Appellate Court upon its finding of fact that there was notice. The Negotiable Instruments Act was not construed, but a mere factual conclusion was reached.

Therefore, when the petition for certiorari in the case of *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank* reached the Supreme Court, it seems clear that that Court realized at once that it turned upon a question of fact, not of law,—a question which by statute was foreclosed by the finding of the Appellate Court, "not open for further consideration" by the Supreme Court, and inasmuch as to grant the certiorari would be a nugatory act, the certiorari was denied.

The only conclusion which can be reached from the denial of the certiorari in that case is that the question sought to be raised in the Supreme Court was one of fact upon which the Supreme Court was foreclosed by the finding of fact by the Appellate Court.

This being evident, the contention by Petitioner that this Court should regard the denial of the certiorari as an adoption by the Supreme Court of a construction of the Negotiable Instruments Act to the extent of preventing this Court from exercising its independent judgment upon a question of commercial law, must be fallacious.

Second.

We venture to assert that the denial of certiorari by the highest court of a State has never been considered to

be an adoption of the views of the intermediate court to the extent of making the decision of the intefmediate court the decision of the highest court of the State.

Under Section 121 of the Illinois Practice Act in force at the time, the denial of a certiorari renders the *judgment* of the Appellate Court final, but this enactment does not have the effect of rendering the *opinion* of the Appellate Court final or *stare decisis* in any cause other than that in which the opinion was filed (Cahill's Ill. Rev. Stat. 1933, Appendix, page LXXVI, par. 120).

Non constat but that the Supreme Court may disagree wholly with the reasoning of the Appellate Court's *opinion,* and still decline to review the judgment, or find that it has no jurisdiction to review.

It must be borne in mind that the statutory certiorari was not a matter of right, even if a showing was made, but a matter of grace, resting in the uncontrolled and non-reviewable discretion of the Supreme Court. In granting a certiorari, or in denying it, the Supreme Court was governed only by its non-reviewable judicial discretion, and was required to give no reason for its action.

If, upon general principles, or what are sometimes called "the fireside equities", the Supreme Court believed the *judgment* of the Appellate Court was right, it could and, as every lawyer knows, often did deny certiorari when it was manifest that the reasons given by the Appellate Court in its opinion were absolutely wrong and without legal foundation.

> "The denial of the writ of certiorari therefore, meant nothing more than that we approved the conclusion of the Appellate Court that the State's Attorney should have signed and presented the petition. *It did not mean that we approved the reasons set out in the opinion of that Court and its determination of*

the merits of the case, and the rights of the parties to be affected by the information when filed (*Soden* v. *Claney*, 269 Ill. 98.)"

People ex rel. v. *Grant*, 283 Ill. 391 at 397.

In this last cited case when it was in the Appellate Court (*People ex rel.* v. *Grant*, 1st Dist., 208 Ill. App. 235), that Court devoted very earnest attention to the contention that a denial by the Supreme Court of a certiorari is tantamount to an expression of opinion by the Supreme Court in accordance with the views expressed in the opinion of the Appellate Court.

The contention was disapproved, the majority of the Court saying (208 Ill. App. at 239, *et seq.*):

"On the argument it was further suggested that as an application had been made to the Supreme Court in that case for a writ of certiorari and denied, the court, by such action, passed upon the merits of the controversy, and thus declared itself to be in harmony with the conclusion reached by the Appellate Court. This contention, in our judgment, involves an entire misconception of the purpose and effect of the statutory provisions in regard to writs of certiorari. Those provisions are substantially identical with a section of the United States statute providing for the issuance of writs of certiorari to the Circuit Court of Appeals.

* * *

"It seems a conclusive answer to the relator's contention to say that, during the 26 years that the United States certiorari act has been in force, there does not appear to be a case in which counsel have suggested that the Supreme Court, by denying the writ of certiorari, stamped the conclusions of the Court of Appeals with its approval, and impliedly made a dec-

laration in regard to what was the law. The language of the statute does not require our Supreme Court to issue a writ of certiorari in any case, but merely provides that it shall be competent for it to do so; nor does it require the court to pass upon the merits of the controversy presented, but leaves that to the discretion of the court, to be exercised in every case. So, in the case cited here, the question considered upon the application for the writ was not necessarily the one as to the correctness of the conclusions of this court. The Supreme Court first had presented to it the question of whether there was anything in the circumstances of the case which made it expedient for it to pass upon the merits of the controversy and to declare the law. Obviously it was competent for the Supreme Court to go into the merits of the contentions made in the petition, but it was equally competent for it to say that as, under the decision of the Appellate Court, the questions involved would again be presented in a *quo warranto* proceeding in which all the parties in interest would be before the court, it would be better to pass upon them in that case, in which a binding adjudication of the rights of all the parties could be made. Any inference, therefore, as to the opinion of the Supreme Court in regard to the correctness of the conclusion reached by the Appellate Court must necessarily rest upon speculation and conjecture. The function of finally declaring the law of the State rests with its Supreme Court, and is accomplished by means of its opinions, in which it speaks through its justices. The only safe rule would, therefore, appear to be that its conclusions in regard to the law are to be found in its reported opinions, and not deduced inferentially from its action in denying writs of certiorari.

* * *

> "The effect of a denial of a writ of certiorari, though conclusive, is purely negative. By its action, the Supreme Court does not review the judgment of the Appellate Court, but declines to do so. This does not make the judgment of the Appellate Court final, but it leaves its finality undisturbed. For these reasons we are constrained to hold that the action of the Supreme Court in denying the State's Attorney's petition for a writ of certiorari in the case cited does not constitute an authoritative declaration in regard to the questions of law involved, and that so far as any action by the Supreme Court is concerned, these questions are still open. It, therefore, devolves upon us to consider the merits of the points presented."

The Supreme Court of the United States, in *Minn. St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410, at 412; 73 L. ed. 766 at 768, construes Sec. 121 of the Illinois Practice Act (the Certiorari section) with reference to the effect of a denial of certiorari, and says:

> "While such denial is not an approval of the reasons on which the Appellate Court rests its judgment, it is an approval of the conclusion reached by it."

We submit that "conclusion" is used by the Court in the sense of "judgment", not reasoning or statutory construction.

The certiorari provisions of Section 121 of the Illinois Practice Act of 1907 are clearly modeled upon the certiorari provisions of the Federal Circuit Court of Appeals Act (Judicial Code, Sec. 347, which is the old Section 240 as amended).

There is a discretionary power in both the Federal and the Illinois Supreme Courts to bring up by certiorari for

review, the judgments of the intermediate court, but it has never been considered by the Federal Courts that a denial by the United States Supreme Court of a certiorari to review a judgment of the Circuit Court of Appeals was an affirmance of the views of that Court, or an adoption or sanction of such views.

In *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251 at 258, the Court says:

> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ" (certiorari) "is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

Again, in *U. S.* v. *Carver*, 260 U. S. 482, at 490; 67 L. ed. 463, Mr. Justice Holmes said:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case *as the bar has been told many times.* Therefore, it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer" (*i. e.*, decisions of Circuit Court of Appeals in which certiorari had been denied). *Cited in Atl. Coast Line R. R. Co.* v. *Powe*, 283 U. S. 401 at 404.

In *Hudson* v. *Maryland Casualty Co.*(C. C. A., 8th Circ.) 1927) 22 Fed. 2nd 791, the Circuit Court of Appeals had occasion to consider the effect of a decision of an intermediate appellate court of Missouri as to construction of a Missouri statute. In denying the contention that the Federal Courts were bound by a construction of a Missouri statute placed upon it by the intermediate appellate court (which seems to be in all respects equivalent to the Appellate Courts of Illinois), Stone, Circuit Judge, said:

> "It is true that for some purposes and in some senses these Courts of Appeals are courts of final re-

sort. There is no *positive right* to a review of their decisions by the Supreme Court of the state. In that sense their decisions are final and in that sense the Supreme Court of the state has referred to them as courts of 'last resort.'

* * *

"But the rule now invoked is one of federal procedure and its meaning must be sought in its purpose. That purpose is for federal courts to apply the state statute as that statute has been authoritatively declared by the highest court of the state. Until the court of last resort, as personified by the highest state court which can speak upon the subject, has spoken, there can be no such finality of decision as required by the rule. The highest court of Missouri is the Supreme Court. Its decisions are controlling upon the three Courts of Appeals of that state (Const. Mo., art. 6 (Amendment of 1884), Sec. 6) and decisions of such Courts of Appeals have not the force of *stare decisis with the Supreme Court.*

* * *

"Each of these Courts of Appeals has a separate geographical jurisdiction and a decision by one such court is binding only within its jurisdiction. Where these courts disagree, there is a divergence of authority even within the state and such differences have occurred. No one nor all of them can *finally* announce the law of the state, only the Supreme Court of the state can do that. This court has great respect for the opinions of the learned judges of these Courts of Appeals and will always give careful attention to the reasoning in their opinions; but persuasive force of reasoning and binding authority of decisions are dif-

ferent matters based upon different considerations. The harmony of decision desirable and sought by the federal rule of construction is harmony with the law as declared for the entire state by the highest state court which could determine the matter. In our judgment, the Courts of Appeals of the State of Missouri are not such courts."

It therefore appears certain that the mere assumption, without authority to support it, indulged in by counsel for petitioner, that the opinion of the Appellate Court, in the *Northwestern Nat. Bank case* was binding on the District Court and the Circuit Court of Appeals cannot prevail, and the Circuit Court of Appeals was correct in holding that:

"It is, however, only the decisions of the highest courts of the states that are binding upon us. *Hudson* v. *Maryland Casualty Co.*, 22 F. (2d) 791 (C. C. A. 8).

The fact that the defeated party sought to review the decision in the *Northwestern Nat. Bank Case, supra*, and the Supreme Court of Illinois denied its application for a certiorari makes that decision no more authoritative. *People* v. *Grant*, 283 Ill. 391, 397, 119 N. E. 344; *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410, 49 S. Ct. 363, 73 L. Ed. 766; *United States* v. *Carver*, 260 U. S. 482, 43 S. Ct. 181, 67 L. Ed. 361. The rule announced in said *Northwestern Nat. Bank* Case, *supra*, has not been approved or passed upon, by the Illinois Supreme Court.

It becomes our duty, therefore, to examine the question in the light of all of the decisions of state and Federal courts and follow the United States Supreme

Court decisions, if there are any in point; otherwise to announce that decision which in our opinion is in accord with the weight of reason and authority."

White-Phillips Co. Inc. v. *Graham*, 74 Fed. 2nd 417.

The fact that review of the decision of the intermediate court by the highest court of the state has been denied, thus making the *judgment* of the intermediate court final, does not have the effect of a decision of the highest court of the state so that the Federal Courts will follow it.

Cont. Secur. Co. v. *Interborough R. T. Co.*, (Circ. Ct. So. Dist. N. Y. 1908) 165 Fed. 945 at 959.

The Burden Was On Respondent to Show Good Faith and this Burden Was Carried.

This was a question of fact, not of construction of a statute.

Under Section 59 of Article IV of the Uniform Negotiable Instrument Act, which is merely a restatement of and declaratory of the law merchant, proof that the bonds were stolen threw the burden on Respondent to prove that it "acquired the title as a holder in due course."

This burden Respondent accepted *in limine*, and having admitted that the bonds had been stolen from Petitioner, Respondent proceeded with frankness and without suppression, to call every officer or agent who had anything to do with the purchase of the bonds as witnesses (Rec. 26-33, 40-43, 49-55). They detailed the whole transaction and voluntarily put in proof of the receipt of the notice at the Davenport office and the routine handling of it.

The record shows (pp. 33, 34, 35, 38, 39, 45-47, 57, 58, 59) that even at the Davenport office (which was not where

the purchase took place), when the notice was received, according to the office routine, it went upon the hook which was the "snapper up of unconsidered trifles," and that no responsible officer or agent at Davenport ever saw it until after the purchase had been made by the Chicago office, and the bonds forwarded to Davenport, where it was then discovered by the merest chance (Rec. 46).

While Petitioner's evidence may at a stretch, be considered as showing proof of mailing to the Chicago office, the evidence of every employee at that office, even to the stenographers, rebuts the presumption raised by the supposed proof of mailing, and shows that it was never received (Rec. 29, 41, 53, 59, 60).

Every officer or agent who had anything to do with the purchase of the bonds testifies that he had never seen the notice and had no knowledge that any such notice had been sent out and had no knowledge that the bonds had been stolen, and the Trial Court so found. (See record page 108).

In the language of the Michigan case (242 N. W. at 742), the Trial Court could have said, "We have no reason to doubt their testimony that they did not see or receive the notice," nor can any ingenuity or insinuation of counsel for Petitioner find anything in the record to justify any reflection upon the veracity, business probity or standing of any officer or agent of appellant.

Counsel for Petitioner endeavor to give the impression that there was some omission or lack of proof in showing absence of knowledge on the part of Respondent, because it appears that there were 27 employees in the Davenport office and 5 or 6 in the Chicago office and Respondent examined but six from Davenport and four from Chicago (Brief of Petitioner, pp. 33-34).

It is true that the evidence shows that the numbers of employees were as stated. (Trans. Rec. p. 30).

But is is equally true that the general system of purchase of bonds was explained by Blair A. Phillips (Trans. Rec. 26-30), and that the evidence shows that every employee, both in Davenport and in Chicago, who had anything to do with either the purchase of bonds or the handling of the notices concerning stolen bonds was called and examined.

In Davenport, the mail was opened and distributed by Offerman, Drum and Crowe (Trans. Rec. 39), and all three of these were called, (Trans. Rec. 39, 57, 58) and described the handling of the notices.

Vernon Ehlers, who was in charge at the Davenport office was called, (Trans. Rec. 43), and described the office routine. (Trans. Rec. 45).

Stutz, the buyer at the Davenport office was called, (Trans. Rec. 37) as was Alexander, the Vice President and Treasurer whose duties were in connection with the Davenport office. (Trans. Rec. 33).

The responsible dealing officers or traders in the Chicago office were Bell and Schriefer, (Trans. Rec. 29) and both of these were called. (Trans. Rec. 40, 49).

Every other Chicago employee was called. (Mrs. Schriefer, Rec. p. 59; Mrs. Bell, Rec. p. 60).

Bell, who personally handled the Connolly transaction, testified that Phillips, Schriefer and himself, together with two stenographers were all of the Chicago employees. (Trans. Rec. 52).

Bell testified that he had no notice of knowledge of any taint on the securities (Trans. Rec. 52) as did. Phillips (Trans. Rec. 29) and Schriefer (Trans. Rec. 41), and the two stenographers in the Chicago office both testified that

they had no knowledge that any circular had been received there. (Trans. Rec. 59, 60).

In the face of this showing, it seems idle to contend that because other employees at Davenport, who are not shown to have had any duties either as to purchase of bonds or handling notices concerning stolen bonds were not called, there was any defect of proof.

Respondent's Brief, Sec. III, p. 7, *supra*.

This question was purely factual,—and the Illinois Appellate Court in the case relied upon by Petitioner so treated it.

No legal question was involved,—no statutory construction necessary.

The decision of the Appellate Court cannot be availed of by Petitioner as a construction of an Illinois Statute in order to prevent this court from exercising its independent judgment on a pure question of commercial law.

The Supreme Court of Illinois has held that as to transfers of negotiable paper, the question of notice of infirmity of title is not a question of law, but a question of fact.

Paine v. *Sheridan Trust & Savings Bank* (1930), 342 Ill. 342 at 348.

So far as our research has disclosed, the principle of the Michigan case, that good faith is established by the testimony of all the persons having to do with the purchase of the securities, is acceded to by the overwhelming weight of authority.

Respondent's Brief, *supra*, page 7.

It has even been held that the unimpeached testimony of the officer or agent who made the purchase that he had no knowledge of any defect of title in the transferor is

sufficient by itself to compel a directed verdict in favor of the purchaser in a case tried to a jury.

Upon a rehearing of *Jerke* v. *Delmont State Bank*, 216 N. W. 362, the South Dakota Supreme Court changed its former opinion, by an opinion rendered February 8, 1929, and reported in 223 N. W. 585, which exhaustively discusses the conflicting views as to the right of the Court to direct a verdict upon the testimony of an interested witness, and finally concludes, in accord with the weight of authority, that the Trial Court should have directed a verdict in favor of the purchaser bank, even though the only testimony as to good faith was that of the president of the bank, who carried out the transaction. The salient parts of the opinion will be found beginning on page 592 of 223 N. W. Rep.

The Cases Relied Upon by Petitioner Distinguished.

We have sufficiently pointed out the misconception of Petitioner in his reliance upon the Illinois Appellate Court case of *N. W. Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22.

Aside from that case, and a criticism of the Michigan case of *Merch. Nat. Bank* v. *Detroit Trust Co.*, 258 Mich. 526, Petitioner also charges that the Circuit Court of Appeals overlooked its own ruling in *C. F. Childs & Co.* v. *Harris Trust & Savings Bank*, 27 Fed. 2nd 633. An analysis of that case will disclose that the opinion of *Carpenter, J.,* does not support the contention.

In that case, the facts were wholly diverse from the state of facts in the case now before the Court, and the crucial legal proposition in that case, upon which the decision turned, is wholly absent from the instant case.

The salient facts in the *Childs case*, divested of unimportant detail are as follows:

An employee of Childs, on September 6, 1921, stole Liberty Bonds of the par value of $25,000 from Harris without the knowledge of Childs. The next day Childs received from Harris a notice of the theft, giving the numbers and denominations of the bonds.

The thief kept the bonds in his possession until June, 1922, and on June 10, 1922, the thief substituted for bonds *owned by Childs*, which were being shipped to New York, *the stolen* bonds, keeping the bonds which were the property of Childs.

At the time of this substitution, Childs had had repeated notices from Harris, giving the numbers and denominations of the stolen bonds.

In sending out the package of bonds to New York, a true list of numbers and denominations of the shipment of bonds which were the actual property of Childs, was included, but when the bonds got to New York, $25,000 of stolen bonds had been substituted by the thief for an equal lot of the bonds owned by Childs. Upon arrival of the shipment in New York, Childs' New York office did not check the bonds received with the enclosed list. If they had so done, the substitution of the stolen bonds, of the theft of which Childs had undisputed knowledge, would have been disclosed.

In the *Childs case*, the firm of C. F. Childs & Company did not get the bonds in the usual course of trade and did not give value for them. The Court disposes of this contention adversely to C. F. Childs & Company, and holds:

1. That there was no negotiation of the bonds to Childs.

2. That Childs gave no value for them, and

3. That if the substitution of the stolen bonds by the thief could be treated as a negotiation, Childs in taking such a position is bound by the guilty knowledge of the thief, its own agent.

There can be no question that Respondent, White-Phillips Co., Inc., took the Illinois highway bonds in the usual and ordinary course of business and for value. The evidence establishes these two elements beyond peradventure, and thus the ratio *decidendi* and crucial point in the *Childs case* is wholly absent in the instant case as shown by the following excerpt from the opinion (p. 635):

> "No citation of authorities is needed on the proposition that, if Childs knew of its thief employe's part in the drama, it was found to make full recompense to Harris. Childs' claim as holder for value under the Illinois Negotiable Instruments Law is not sound, because there was no negotiating between Childs and its thief employe, and because, if Childs chooses to treat it as a *negotiation* (*ex parte* to say the least), it must adopt the transaction *in toto*, charged with the guilty knowledge of the wrongdoer, its agent and servant."

CONCLUSION.

There is here presented an attempt to found a solitary exception in a single state to an universally accepted doctrine of the law of commercial paper, upon the decision of an inferior court of Illinois, concerning which the highest court of a respectable jurisdiction has said "As far as we have been able to determine, this case stands alone" (*Merch. Nat. Bank* v. *Detroit Trust Co.*, 258 Mich. 526), which decision is in conflict with a later holding of another co-ordinate branch of the same inferior court (*Nat. Bank* v. *Uptown State Bank*, 273 Ill. App. 401 at 405).

We submit that it is not upon such tenuous grounds that this court should overset a time honored, established and recognized rule of the law merchant, bottomed upon principle and essential to the free and liquid flow of negotiable paper.

Wherefore, respondent respectfully submits that the judgment of the Circuit Court of Appeals should be affirmed.

All of which is respectfully submitted.

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